IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Company Petition No.469 of 2005

with

Company Application No.28l of 2005

In the matter of Companies Act, l956(l) of l956;

and

In the matter of Section 39l of the Companies Act, l956;

and

In the matter of Scheme of Arrangement between The Pharmaceutical Products of India Limited its secured creditors and Wanbury Limited.

The Pharmaceutical Products of India Limited, a company incorporated under the Companies Act, l956 having its registered office at Plot No.D-3l2 Industrial Area Turbhe, MIDC Vashi Navi Mumbai 400705 ..Petitioner

with

Company Petition No.470 of 2005

with

Company Application No.282 of 2005

In the matter of Companies Act, l956(l) of l956;

and

In the matter of Section 39l of the Companies Act, l956;

and

In the matter of Scheme of Arrangement between The Pharmaceutical Products of India Limited its unsecured creditors and Wanbury Limited.

.....

The Pharmaceutical Products of India Limited, a company incorporated under the Companies Act, l956 having its registered office at Plot No.D-3l2 Industrial Area Turbhe, MIDC Vashi Navi Mumbai 400705 ..Petitioner

Mr Virag Tulzapurkar i/b M/s Rajesh Shah and Co for

petitioners

Mr Sham Mehta with Mr Darshan R Mehta with Rishab Shah and Mr Salil K Shah i/b M/s Dhruve Liladar & Co for UTI objectionist.

Mr Biren Saraf with Mr Ashish Kamat i/b Kartikeya and Associates for Tata Motors Ltd

Mr. Shrikant Chavan i/b Vandana Jaisingh for Indus Ind Bank and Budhram Finance Ltd

Mr Birendra Saraf with Ms Rajashree Bhat with Ms Nandini Chettier i/b M/s M K Ambalal and Co for Pedilite Ind Ltd interveners.

Mr N H Seervai Sr Counsel i/b Law Desk for IDBI

Mr F E D'vetre i/b Law Desk for Bank of India

Messrs C J Joy with R C Master and M M Goswami i/b T C Kaushik for Regional Director.

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CORAM; A.M.KHANWAILKAR J.

Dated: l3th February 2006

JUDGMENT:

l. This common judgment disposes of both the above mentioned company petitions. By these petitions filed under section 39l of the Companies Act, l956, the petitioner company prays that the arrangement embodied in the scheme of arrangement referred to

in the respective petitions be sanctioned by this court with or without modification and declare the same to be binding on the petitioner company and the concerned secured and unsecured creditors named in the scheme. The former petition is in relation to the scheme of arrangement with regard to the secured creditors, whereas the later is with regard to the specified unsecured creditors.

2. The petitioner company was incorporated on May l5, l986 in accordance with the provisions of the Companies Act, l956. The petitioner company became a public limited company on July l4, l986. The share capital of the petitioner company as on March 3l, 2005 is stated to be as under:

Authorised	Figures in Rs
3,00,00,,000 equity shares of Rs l0 each	30,00,00,000
l0,00,000 2% Cumulative Convertible Preference shares of Rs.l00 each	l0,00,00,000
l0,00,000 5% Cumulative Convertible Preference shares of Rs.l00 each	l0,00,00,000
20,00,000 Redeemable Preference shares of Rs.l00 each	20,00,00,000

Total	70,00,00,000
Issued subscribed & paid up	
95,34,090 equity shares of	
Rs l0 each	9,53,49,900
2,50,000 Redeemable Preference	
Shares of Rs.l00 each	2,50,00,000
Total	l2,03,40,900

3. The main objects of the petitioner company on its incorporation are as follows:

> "(i) To carry on business in India and elsewhere as manufactures, products, processors, formulators, sellers, importers, exporters, merchants, distributors, traders and dealers in proprietary medicines, common medicinal preparations, vitamin preparations, elixirs,drops, tonics, other liquid drugs and medicines, injections, tablets, capsules, lotions, ointments, medicinal preparations containing anti-biotics, creams and powders.
>
> (ii) To carry on the business of preparing for sale or otherwise the formulas for the manufacture of pharmaceutical drugs and medicines, injections, capsules, tablets,

lotions, patent and proprietary medicines, common medicinal preparations, elixirs, drops,tonics other liquid drugs and medicines, medicinal preparations containing anti-biological pharmaceutical tablets, biological and non-biological capsules, tranquillisers, vitamins and tonic preparations, medicated ointments, harmons preparations, ayurvedic products, medicated powders, anti-diarroheal preparations defestures, anti-cholinergic preparations, anti-asthamatics preparations, opthalmic lotions and ointments, drugs and druggists as defined under the Drugs Act and Rules in all its branches"

4. The petitioner company commenced its business in the year l986 and has been carrying on the same since then. In the course of business the petitioner company has acquired several liabilities over the years resulting in the assets of the petitioner falling short of its liabilities requiring reference to the BIFR in relation to the petitioner company. In the said proceedings the BIFR vide its order dated 27th October, 2004 has recommended winding up of the petitioner company on the finding that the petitioner’s accumulated

losses exceed the net worth and the petitioner is not likely to become viable in future while meeting all its due financial obligations. The petitioner has questioned the said decision of BIFR by way of an appeal before the AAIFR, which is still pending.

5. It is stated that the petitioner company has found a strategic partner in Wanbury Limited who has extended help for revival and rehabilitation of the petitioner company by infusing necessary funds and providing for modalities whereby the dues of the concerned creditors of the petitioner company referred in the scheme under consideration could be settled in a more fruitful manner than by sale of the assets of the petitioner company at the instance of the secured creditors. It is stated that the tie up between the petitioner and Wanbury Limited will help to streamline operations of both the companies resulting in the petitioner company overcoming its accumulated losses on the assumption that Wanbury Limited has global presence in APIs and is manufacturing Metformin and Salsalate and has introduced other products like Amytriptaline, Tramadol, Promethazine and Sertraline over the last few months. It is stated that Wanbury Limited is the World’s largest producer of Metformin and it caters to API markets in over 40 countries

especially the related markets in North America, Europe etc. It is further stated that Wanbury Limited enjoys an excellent customer loyalty with over 200 companies across the globe and is keen to explore avenues to enhance its sales and increase its capacities to address the increased need of its customers.

6. As mentioned earlier,for the offer made by the said Wanbury Limited who has come forward to act as strategic partner, on April l4, 2005, the board of directors of the petitioner company considering all the aspects of the matter resolved that subject to the directions and sanction of the appropriate court as may be required under law and subject to such permission of such other authorities as may be necessary, the scheme of arrangement between the petitioner company, its named secured creditors (six in number) and Wanbury Limited be made on the broad basis referred to in the scheme of arrangement. The material provisions of the proposed scheme of arrangement as has been suggested by the board of directors of the petitioner company would read thus:

"ARRANGEMENT WITH THE SECURED CREDITORS OF PPIL

3.l Amounts due:

The amounts due to the secured creditors of PPIL as on appointed date are placed as under:

Secured Lenders	Outstanding Dues (Rs In Lacs)
Asset Reconstruction Company (India) Limited (ARCIL)	l0,360
Industrial Investment Bank of India (IIBI)	973
Unit Trust of India (URI)	3,000
Bank of India (BOI)	233
Bank of Baroda (BOB)	2,655
Union Bank of India(UBI)	436
Total	l7,657

3.2 Consideration payable

Towards the said amounts due to each of the Secured Creditors, to the facilities referred to above, PPIL,alongwith its associates and Wanbury have agreed that the following assets are available to be set off towards payment of the said amounts:

a) Rs.24,064,470 (Rupees Two Crore forty lac sixty four thousand four hundred and seventy only) in cash.

b) Rs.97,00,200 (Rupees Ninety seven lakh two hundred only) being in the form of 64,668 Equity shares of Wanbury Limited of Rs.l0 each issued at a premium of Rs.l40 each issued and allotted by Wanbury.

c) Rs.2,42,50,000(Rupees two crores and forty two lac and fifty thousand only) being in the form of Zero coupon Non Convertible Debentures (hereinafter referred to as "NCDs") issued and allotted by Wanbury.

d) Rs.5,82,00,000(Rupees five crore and eighty two lac only) being in the form of Zero coupon Optionally Fully Convertible Debentures (hereinafter referred to as "OFCDs") issued and allotted by Wanbury.

e) The building owned by PPIL admeasuring approx 339 sq meters of regular constructed space and approx 275.l7 sq meters of constructed mezzanine spare and located at 2l2,Marwah Industrial Estate, Saki Vihar Road, Saki Naka, Mumbai 400072 and bearing the particulars mentioned in schedule II hereto.

f) The building owned by PPIL, through its partnership firm Neeldeep Plastics, located at D-306, TTC Industrial Area, MIDC, Turbhe, Navi Mumbai 400705 and bearing the particulars mentioned in schedule III hereto. On or prior to the date on which the present scheme is filed PPIL, shall procure and file before the Hon'ble Court before whom the scheme will be filed under section 39l of the Companies Act, l956, a certificate of no-objection from the partners of Neeldeep Plastics, will be filed for the transfer of the aforesaid building described in schedule III, in accordance with clause 5.l.5 of this scheme.

3.3 Terms and conditions:

3.3.l The Secured Creditors have agreed that the consideration referred to in clause 3.2 shall be a settlement towards outstanding dues for which charge had been created on the assets of PPIL.

3.3.2 The amounts that remain outstanding out of the amounts set out in clause 3.l shall be treated as unsecured loans and the rights of the secured creditors to the extent that the outstanding amounts which remain unpaid after the agreement of the secured creditors to the scheme have been procured shall be the same as those unsecured creditors of PPIL.

3.4 The Secured Creditors have also agreed that the payment of the consideration referred to in clause 3.2 shall occur only after the AAAIFR or other competent forum or court has passed orders for the merger of PPIL with Wanbury Limited, or passed such other orders facilitating a complete transaction of PPIL assets and ownership,free of encumbrances to Wanbury, to the satisfaction of Wanbury, and shall be subject to the successful completion of all the formalities required for securing the consent of unsecured creditors to such other scheme as is proposed with them, and the approval of the shareholders of PPIL and Wanbury (for the issue of shares, OFCDs and NCDs under section 8l(lA) of the

Companies Act, l956) have been procured in accordance with law and all approvals have been acquired from all the parties, agencies and authorities towards the performance of acts to give effect to such orders as mentioned in clause 9.l below and this scheme.

3.5 The Secured Creditors shall perform all acts to cooperate with PPIL and Wanbury in any and all manners to give effect to the scheme, including executing and filing documents, materials, affidavits and other evidence in court or such other forum or authority as may be necessary, in support of this scheme.

3.6 The Secured Creditors shal issue a "No Dues" certificate upon receipt of consideration from Wanbury as stated in clause 3.2 subsequent to the Effective Date as per clause 9.2 of the scheme. In the event that the scheme gets the necessary approvals as stated in clause 9.l and is implemented/ effective , the Secured Creditors shall forthwith perform all such acts as are necessary to end all such proceedings and/or actions, as mentioned in schedule IV annexed hereto and any other proceedings and cheque bouncing mattes filed by the Secured Creditors now pending or arising in future.

3.7. Subject to the approvals as may be necessary to be obtained in that behalf PPIL and Wanbury hereby confirm that there are no legal infirmities/ bars on their transferring the assets mentioned above towards the due discharge of their duties mentioned in this scheme. PPIL is the absolute owner of the properties described in clause 3.2(e) and (f) which are free of encumbrances and are not charged in favour of any lender and which are now being offered as a part of this scheme.

3.8 The compromise and arrangements contained in this scheme with the secured creditors, shall be irrevocably binding on all the secured creditors with effect from the date on which the majority of the lenders at the meeting of the lenders meet and agree on this scheme.

4. Consideration to each secured creditors.

4.l It has been agreed that the total payment of the consideration referred to in clause 3.2, to the secured creditors shall amount to the following:

Lenders	Equity	NCD	OFCD	Cash	Total
ARCIL	5,988,492	l4,970,92l	35,930,2l0	l4,856,382	7l,746.006
IIBI	583,222	l,458,024	3,499,258	l,446,869	6,987,374
Unit Trust of India	2,400,445	6,000,990	l4,402,376	5,955,078	28,758,889
Bank of India	207,262	5l8,l45	l,243,549	5l4.l8l	2,483,l37
Bank of Baroda	442,584	l,l06,436	2,655,447	l,097,97	5,302,438
Union Bank of India	78,l95	l95,483	469,l60	l93,988	936,826
Total Principal	9,700,200	24,250,000	58,200,00	24,064,470	ll6,2l4,670

(Figures in Rupees)

4.2 In addition to the above the immovable assets referred to in clause 3.2 of the scheme valued at Rs.2,25,80,000 (Two crores twenty five lacs eight thousand only) shall also be part of the consideration in accordance with the provisions of this scheme.

5. Method and Mode of paying consideration:

5.l Subject to clause 3.3.l and 3.3.2, as full and final consideration and in full settlement of all dues, overdrafts, borrowings, interest payments, penalties, guarantees, equity conversion rights or other rights whatsoever, Wanbury would give to the Secured Creditors, the consideration in the manner,stated hereunder:

5.l.l Cash:

Rs.24,064,470(Rupees two crores forty lac sixty four thousand four hundred and seventy only) is payable as cash down payment which shall be payable to each of the secured creditors on Effective date as Described below:

Lenders	cash
ARCIL	l4,856,382
IIBI	l,446,869

Unit Trust of India	5,955,078
Bank of India	5l4,l8l
Bank of Baroda	l,097,97l
Union Bank of India	l93,988
Total Principal	24,064,470

50% (fifty percent) of the total cash consideration referred to above shall be paid by Wanbury in accordance with the scheme within 3 weeks upon of this scheme being sanctioned by the High Court of Judicature at Mumbai.

If the scheme is not approved as per clause 9(l) of the scheme of arrangement than the aforesaid 50% (fifty percent) will be return back to Wanbury within l5 days.

5.l.2 Shares of Wanbury

Wanbury shall take such steps as are necessary to issue within 30 days of the Effective Date, equity shares of Rs.l0 each fully paid up at a premium of Rs.l40 per share. These equity shares shall be distributed amongst the secured creditors in the proportion mentioned below:

Lenders	Equity	Shares
ARCIL	5,988,492	39,923
IIBI	583,222	3,888
Unit Trust of India	2,400,445	l6,003
Bank of India	207,262	l,382
Bank of Baroda	442,584	2,95l
Union Bank of India	78,l95	52l
Total Principal	9,700,200	64,668

The shares as aforesaid shall be issued within 30 days of the Effective Date and shall be subject to the consents/ approvals and in the manner prescribed by the relevant agencies, authorities and bodies including the BIFR/AAIFR, Courts, SEBI and the Stock Exchanges.

5.l.3. Zero Coupon Non Convertible Debentures(NCDs)

Wanbury shall take such steps as are necessary to issue Zero coupon Non Convertible Debentures (NCDs) of a face value of Rs.l00 each comprising Part A being of a face value of Rs.60 each and Part B being of a face value of Rs.40 each. Part A of the NCDs shall be redeemable at the face value of Rs.60 each at the end of two years from the date of issue of the NCDs. Part B of the NCDs shall be redeemable at the face value of Rs.40 each at the end of three years from the date of issue of the NCDs. The NCDs shall be issued to the secured creditors within 30 days of the Effective Date and subject to the consents/ approvals and in the manner prescribed by the relevant agencies, authorities and bodies including the BIFR/AAIFR and the appropriate Courts. Wanbury shall take all necessary steps to obtain such approvals. The NCDs shall be pari passu secured against the fixed assets of Wanbury.

Lenders	NCD	No of NCDs
ARCIL	l4,970,92l	l49,709
IIBI	l,458,024	l4,580
Unit Trust of India	6,000,990	60,0l0
Bank of India	5l8,l45	5,l8l
Bank of Baroda	l,l06,436	ll,064
Union Bank of India	l,095,483	l,055
Total	24,250,000	242,499

5.l.4. Zero coupon Optionally Fully Convertible Debentures (OFCDs):

a) Wanbury shall take such steps as are necessary issue OFCDs of a face value of Rs.l000 per OFCD within 30 days of the Effective Date as stated below:

Secured lenders	amount	No of OFCDs
ARCIL Trust	35,930,2l0	35,930
IIBI	3,499,258	3,499
UTI	l4,402,376	l4,402

BOI	l,243,549	l,244
BOB	2,655,447	2,655
UBI	469,l60	469
Total	58,200,000	58,l99

(b) The OFCDs shall be optionally convertible and the option may be exercised between l8 months and 36 months of the date of issue of the OFCDs. The price at conversion of these OFCDs shall be higher of: (a) 67% of the 3 months average weekly closing high low price per share quoted on the BSE preceding the date of notice of conversion; or (b) a price of Rs.l25 per share whichever is higher. The paid up value of the share upon conversion shall be Rs.l0 per share. The Conversion Option shal only be exercised once and may before a part of the OFCDs, provided that such part shall not be less than 25% of the aggregate value of the OFCD. The unconverted part of OFCD shall be repayable to the OFCD holder, in two equal instalments at the end of 36 months and 48 months from the date of allotment of OFCD. The OFCDs shall be allotted on the effective date and subject to the consents/ approval and in the manner prescribed by the relevant agencies, authorities and bodies including the BIFR/AAIFR and the appropriate courts. The OFCDs shall be secured with a pari passu charge on the assets of PPIL.

(c) Subject to the rights and interests of the Bankers and existing charge holders of Wanbury Limited, the holders of NCDs will be given a pari passu charge on the assets of Wanbury Limited and holders of the OFCDs shall be given a pari passu charge on the assets of PPIL that may be acquired by Wanbury, which, each of them,shall share with subsequent creditors that may be introduced by Wanbury for any purpose of PPIL/ Wanbury on the basis of the asset security coverage ratio fixed at l:l. The secured creditors to whom the NCDs are allotted, undertake and agree that they shall cede pari passu charge to future creditors of Wanbury so long as the asset security ratio mentioned above is maintained by Wanbury.

d) Immediately upon conversion of the OFCDs,the shares shall be listed by the appropriate Stock Exchange.

5.l.5. Immovable assets of PPIL;

a) Subsequent to the effective date, the properties described at clauses 3.2(e) and 3.2(f) shall be sold by ARCIL, the principal secured creditor of PPIL, on

best effect basis on the scheme coming into effect in accordance with clause 9.l of this scheme, and the proceeds thereof shall be paid by ARCIL to each of the secured creditors on the following basis:

Sharing of ownership and sale proceeds	As secured Lender
ARCIL	52.90%
IIBI	5.33%
Unit Trust of India	2l.92%
Bank of India	l.89%
Bank of Baroda	5.55%
Union Bank of India	0.98%
Total Principal	88.57%

b) PPIL shall extend suitable cooperation to ARCIL and sign or cause to be singed all documents necessary for the sale of the said properties to give effect to this clause.

c) Any fee and /or expenses/costs incurred by ARCIL/ Wanbury/ PPIL in relation to the said properties shall be deducted from the sale proceeds of the said properties.

d) The secured creditors shall if though necessary by then execute amongst themselves documents as required their agreement to the sale of the properties by ARCIL or make such other arrangement as they deem fit for the expeditious sale of the property and/ or distribution of the consideration received from the sale thereof in the proportion mentioned in sub-clasue 5.l.5(a). Wanbury and/or PPIL shall have no liability on these assets including taxes, costs and/or charges payable or incurred in respect of the properties or sale of these properties or the distribution of the proceeds therefrom to the secured creditors or the allocation and sale thereof to the secured creditors as the case may be and Wanbury/ PPIL shall have no involvement or role in such agreement entered into between ARCIL and the other secured lenders and as such, on the effective date,the loans, dues and liabilities towards the secured creditors whether from PPIL, Wanbury and/or any of their associates, officers, employees or directors shall stand completely discharged subject to the payment of the

consideration described in this scheme.

e) For the purposes of this scheme, the assets referred to in clauses 3.2(e) and 3.2(f) shall together be valued at a price of Rs.2,258 crores, regardless of the price at which the same are sold by ARCIL in accordance with clause 5.l.5 (a) above and the amounts outstanding towards the secured creditors shall be deemed as having been paid back to the extent of Rs.2,00,00,000 (Rupees two crores only) regardless of the actual amounts received subsequently by the secured creditors.

6. Results for Wanbury:

6.l Upon settlement of consideration as detailed in clauses 4 and 5 above Wanbury Limited shall get complete control over PPIL including all its assets save and except the properties referred to in clauses 34.2(e) and 3.2(f), subject to the approval of the merger and in the manner stipulated by the appropriate forum including the BIFR/AAIFR and/or this court.

6.2 In accordance with clause 6.l of this scheme, in respect of the properties referred to in clauses 3.2(e) and 3.2(f) of the scheme, Wanbury shall have no control, in the event of their sale in accordance with clauses 5.l.5(a) and clause 5.l.5(b) above.

9. Scheme conditional on approval/sanctions and effective date.

9.l The Scheme is conditional on and subject to all of the conditions mentioned in sub-clausses (a) to (e) hereunder having been duly met/completed.

a) approval of an agreement to the scheme by the requisite majority of the secured creditors of PPIL as may be directed by the High Court of Judicature at Bombay.

b) approval of an agreement to such other scheme as may be proposed for the Banks and Financial institutions being unsecured creditors by the requisite majority of the Banks and Financial institutions being unsecured creditors of PPIL as may be directed by the High Court of Judicature at Bombay.

c) Sanctions and orders under the provisions of section 39l of the Act being obtained by PPIL from the High Court of Judicature at Bombay

d) Receipt of the order of AAIFR and/or such other

forum setting aside the recommendations for winding up of PPIL, passed by the BIFR.

e) approvals of the shareholders of Wanbury.

f) Approval and acceptance of an overall settlement including an order for merger, or other mode of acquisition of assets of PPIL by Wanbury or such scheme of PPIL by BIFR/AAAIFR.

g) Filing and submission of any of the aforesaid orders of any forum with any agency/statutory body,as may be required,including the ROC and

h) All other sanctions and approvals as may be required in respect of this scheme being obtained.

9.2 This scheme shall become effective on the date on which all the conditions referred to in clause 9.l have been duly met/completed and such date shall be the effective date for the purposes of this scheme.

l0. Effect of Non-Receipt of Approval/Sanctions

In case the scheme is not sanctioned by the High Court of Judicature at Bombay, or in the event any of the approvals or conditions enumerated in para 9.l above not being obtained or complied with, or for any other reason, the scheme cannot be implemented, the status quo of the secured creditors of PPIL shall be restored as if the scheme had not been proposed and all liabilities of PPIL towards the secured creditors and the rights of the secured creditors including the right to take such legal action and proceedings as they deem fit shall be restored"

7. The board of directors of the petitioner company also on the same day i.e. April l4,2005, resolved that subject to the directions and sanction of the appropriate court as may be required under law, the scheme of arrangement between the petitioner company, its unsecured creditors (named l8 unsecured creditors) and Wanbury Limited be made on the broad basis referred to in the scheme. The material provisions of

the proposed scheme of arrangement in so far as the specified unsecured creditors would read thus:

"ARRANGEMENT WITH THE UNSECURED CREDITORS OF PPIL

3.l Amounts due:

The amounts due to the unsecured creditors of PPIL, are placed as under:

Unsecured creditors	Dues(Rs Lac)
Asst Reconstruction company (India) Limited (ARCIL)	l3,998
Industrial Investment Bank of India Ltd, (IIBI)	962
Unit Trust of India	3,956
Bank of India	229
Bank of Baroda	2,644
Union Bank of India	437
LIC-Asset Management Company	l,l09
Life Insurance Corpn of India	l,250
General Insurance Corpn of India	l73
New India Assurance	204
United India Insurance	204
GIC Mutual Fund	582
LIC Housing Finance	264
Army Group Insurance Fund	384
ICICI Bank	763
Ind Bank Merchant Banking Services Limited	4l6
Abhyudaya Coop Bank Limited	48

Indusind Bank Ltd	65
Total principal	27,687

3.2 Consideration payable

Towards the said amounts due to each of the unsecured creditors, the company along with its associates and Wanbury to the facilities referred to above, has agreed that the following assets are available to be set off against these amounts:

a) Rs.l50.03 (Rupees one hundred fifty lacs and three thousand only) in cash.

b) The building owned by PPIL admeasuring approx 339 sq meters of regular constructed space and approx 275.l7 sq meters of constructed mezzanine spare and located at 2l2,Marwah Industrial Estate, Saki Vihar Road, Saki Naka, Mumbai 400072 and bearing the particulars mentioned in schedule II hereto.

c) The building owned by PPIL, through its partnership firm Neeldeep Plastics, located at D-306, TTC Industrial Area, MIDC, Turbhe, Navi Mumbai 400705 and bearing the particulars mentioned in schedule III hereto.

3.3 Terms and conditions:

3.3.l The Unsecured Creditors have agreed that the consideration referred to in clause 3.2 shall be in full and final settlement of all dues and liabilities of PPIL (and the guarantors) for the liabilities of PPIL towards the Unsecured Creditors.

3.3.2 The unsecured creditors have also agreed that the payment of the consideration referred to in clause 3.2 and the transfer envisaged in this scheme shall occur only after the AAAIFR or such other forum or court has passed orders for; (a) merger of PPIL with Wanbury Limited; and (b) passed such other orders facilitating a complete transition of PPIL assets and ownership, free of encumbrances, to Wanbury, to the satisfaction of Wanbury and all approvals have been acquired from all parties, agencies and authorities towards the performance of acts to give effect to such orders and this scheme.

3.3.3 The Unsecured Creditors shall perform all acts to cooperate with PPIL and Wanbury, in any and all manners to give effect to the scheme, including filing documents, materials,affidavits,and other evidence in

court or such other forum as may be necessary, in support of this scheme.

3.3.4 The Unsecured Creditors shall issue a "No Dues" certificate upon receipt of consideration from Wanbury as stated in clause 3.2 subsequent to the effective date. In the event that the scheme gets the necessary approvals as stated in clause 9.l and is implemented/ effective, the unsecured creditors shall forthwith perform all such acts as are necessary to end all such proceedings and/or actions, as mentioned in schedule IV annexed hereto and any other recovery proceedings including cheque bouncing matters filed by the Unsecured Creditor now pending or arising in future.

3.3.5. Subject to the approvals and arrangements contained in this scheme and the scheme of arrangement with the unsecured creditors of PPIL,PPIL and Wanbury hereby confirm that there are no legal infirmities/ bars on their transferring the assets mentioned above towards the due discharge of their duties mentioned in this scheme. PPIL is the absolute owner of the properties described in clause 3.2(b) and (c) which are free of encumbrances and are not charged in favour of any lender and which are now being offered as a part of this scheme.

3.3.6 The compromise and arrangements contained in this scheme with the unsecured creditors, shall be binding on all the unsecured creditors with effect from the date on which the majority of the unsecured creditors meet and agree to this scheme.

4. Consideration to each secured creditors.

4.l It has been agreed that the total payment of the consideration referred to in clause 3.2, to the unsecured creditors shall be proportionate to the amount due towards each of them and shall amount to the following:

Unsecured creditors	Total consideration in Indian Rupees
ARCIL	7,896,480
IIBI	240,59l
Unit Trust of India	l,606,709
Bank of India	58,802
Bank of Baroda	l,796,2l4

Union Bank of India	3l7,352
LIC-Asset Management Company	467,346
Life Insurance Corpn of India	584,l82
General Insurance Corpn of India	70,l02
New India Assurance	8l,786
United India Insurance	8l,786
GIC Mutual Fund	233,673
LIC Housing Finance	ll6,836
Army Group Insurance Fund	233,673
ICICI Bank	623,907
Ind Bank Merchant Banking Services Limited	467,346
Abhyudaya Coop Bank Limited	53,044
Indusind Bank Ltd	73,l40
Total principal	l5,002,966

4.2 In addition to the above the immovable assets referred to in clauses 3.2(b) and 3.2(c) of the scheme valued for the purposes of this scheme,at Rs.2,25,80,000 (Two crores twenty five lacs eight thousand only) shall also be part of the consideration payable in accordance with the provisions of this scheme, after the assets have been appropriately dealt with in accordance with the scheme of arrangement with the secured creditors u/s 39l of Companies Act, l956.

5. Method and Mode of paying consideration:

5.l As full and final consideration and in full settlement of all dues, overdrafts, borrowings, interest payments, penalties, guarantees, equity conversion rights or other rights whatsoever, Wanbury would give to the Unsecured Creditors, the consideration in the manner,stated hereunder:

5.l.l Cash:

Rs.l50.03 lacs as cash down payment which shall be

payable to each of the unsecured creditors on or after the Effective date as described below:

Unsecured creditors	cash in Indian Rupees
ARCIL	7,896,480
IIBI	240,59l
Unit Trust of India	l,606,709
Bank of India	58,802
Bank of Baroda	l,796,2l4
Union Bank of India	3l7,352
LIC-Asset Management Company	467,346
Life Insurance Corpn of India	584,l82
General Insurance Corpn of India	70,l02
New India Assurance	8l,786
United India Insurance	8l,786
GIC Mutual Fund	233,673
LIC Housing Finance	ll6,836
Army Group Insurance Fund	233,673
ICICI Bank	623,907
Ind Bank Merchant Banking Services Limited	467,346
Abhyudaya Coop Bank Limited	53,044
Indusind Bank Ltd	73,l40
Total principal	l5,002,966

5.l.2 Immovable assets of PPIL

a) Subsequent to the effective date, the properties described at clauses 3.2(b) and 3.2(c) shall be sold by ARCIL, the principal unsecured creditors of PPIL, on best efforts basis on the scheme coming into effect in accordance with clause 9.l of this scheme, and the proceeds thereof shall be paid by ARCIL to each of the unsecured creditors on the following basis:

Unsecured creditors	Sharing of ownership and sale proceeds
ARCIL	6.02%
IIBI	0.l8%
Unit Trust of India	l.22%
Bank of India	0.04%
Bank of Baroda	l.37%
Union Bank of India	0.24%
LIC-Asset Management Company	0.36%
Life Insurance Corpn of India	0.45%
General Insurance Corpn of India	0.05%
New India Assurance	0.06%
United India Insurance	0.06%
GIC Mutual Fund	0.l8%
LIC Housing Finance	0.09%
Army Group Insurance Fund	0.l8%
ICICI Bank	0.48%
Ind Bank Merchant Banking Services Limited	0.36%
Abhyudaya Coop Bank Limited	0.04%
Indusind Bank Ltd	0.06%
Total principal	ll.43%

b) PPIL shall extend suitable cooperation to ARCIL and sign or cause to be singed all documents necessary for the sale of the said properties to give effect to this clause.

c) Any fee and /or expenses/costs incurred by ARCIL/ Wanbury/ PPIL in relation to the said properties shall be deducted from the sale proceeds of the said properties.

d) The unsecured creditors shall if though necessary by then execute amongst themselves documents as required their agreement to the sale of the properties by ARCIL or make such other arrangement as they deem fit for the expeditious sale of the property and/ or distribution of the consideration received from the sale thereof in the proportion mentioned in sub-clasue 5.l.5(a). Wanbury and/or PPIL shall have no liability on these assets including taxes, costs and/or charges payable or incurred in respect of the properties or sale of these properties or the distribution of the proceeds therefrom to the unsecured creditors or the allocation and sale thereof to the unsecured creditors as the case may be and Wanbury/ PPIL shall have no involvement or role in such agreement entered into between ARCIL and the other unsecured lenders and as such, on the effective date,the loans, dues and liabilities towards the unsecured creditors whether from PPIL, Wanbury and/or any of their associates, officers, employees or directors shall stand completely discharged subject to the payment of the consideration described in this scheme.

e) For the purposes of this scheme, the assets referred to in clauses 3.2(b) and 3.2(c) shall together be valued at a price of Rs.2,25,80,000 (Two crores twenty five lac eighty thousand only) regardless of the price at which the same are sold by ARCIL in accordance with clause 5.l.5 (a) above and the amounts outstanding towards the unsecured creditors shall be deemed as having been paid back to the extent of Rs.25,80,000 (Rupees twenty five lacs eighty thousand only) regardless of the actual amounts received subsequently by the unsecured creditors.

6. Results for Wanbury:

6.l Upon payment of cash consideration towards full and final settlement mentioned in clauses 4 and 5 above, Wanbury Limited shall get complete control over PPIL including all its assets save and except the properties referred to in clauses 34.2(b) and 3.2(c), subject to the approval of the merger and in the manner stipulated by the appropriate forum including the BIFR/AAIFR and/or this court.

6.2 In accordance with clause 6.l of this scheme, in respect of the properties referred to in clauses 3.2(b) and 3.2(c) of the scheme, Wanbury shall have no control, in the event of their sale in accordance with clause 5.l.2(a) and in the event of their transfer in accordance with clause 5.l.2(b) above.

9. Scheme conditional on approval/sanctions and effective date.

9.l The Scheme is conditional on and subject to all of the conditions mentioned in sub-clausses (a) to (e) hereunder having been duly met/completed.

a) approval of an agreement to the scheme by the requisite majority of the unsecured creditors of PPIL as may be directed by the High Court of Judicature at Bombay.

b) approval of an agreement to such other scheme as may be proposed for the Banks and Financial institutions being secured creditors by the requisite majority of the Banks and Financial institutions being secured creditors of PPIL as may be directed by the High Court of Judicature at Bombay.

c) Sanctions and orders under the provisions of section 39l of the Act being obtained by PPIL from the High Court of Judicature at Bombay

d) Receipt of the order of AAIFR and/or such other forum setting aside the recommendations for winding up of PPIL, passed by the BIFR.

e) approvals of the shareholders of Wanbury.

f) Approval and acceptance of an overall settlement including an order for merger, or other mode of acquisition of assets of PPIL by Wanbury or such scheme of PPIL by BIFR/AAAIFR.

g) Filing and submission of any of the aforesaid orders of any forum with any agency/statutory body,as may be required,including the ROC and

h) All other sanctions and approvals as may be required in respect of this scheme being obtained.

9.2 This scheme shall become effective on the date on which all the conditions referred to in clause 9.l have been duly met/completed and such date shall be the effective date for the purposes of this scheme.

l0. Effect of Non-Receipt of Approval/Sanctions

In case the scheme is not sanctioned by the High Court of Judicature at Bombay, or in the event any of the approvals or conditions enumerated in para 9.l above not being obtained or complied, or for any other reason, the scheme cannot be implemented, the status

quo of the unsecured creditors of PPIL shall be restored as if the scheme had not been proposed and all liabilities of PPIL towards the secured creditors and the rights of the unsecured creditors including the right to take such legal action and proceedings as they deem fit shall be restored"

(bracket in clause 3.3.l supplied)

8. The petitioner company thereafter approached this court by taking out two separate Judges Summons being Civil Application Nos. 28l of 2005 and 282 of 2005 with regard to the respective schemes of specified secured and unsecured creditors referred to above. This court on April 29, 2005 directed the petitioner company to convene meeting of the secured creditors on Saturday 4th June 2005 at ll.30 a.m. at Riverview Hotel at Patalganga, District Raigad for the purpose of considering the scheme of arrangement. This court also nominated the chairman for the said meeting and provided for the manner in which the said meeting should consider the scheme of arrangement of secured creditors. In so far as the scheme of arrangement regarding the specified unsecured creditors, this court directed the petitioner company to convene a meeting at the Riverview Hotel, Patalganga, District Raigad on Saturday llth June 2005 at ll.30 a.m. for considering the proposed scheme of arrangement and also nominated persons who would act as Chairman for the said meeting.

9. Pursuant to the aforesaid directions given by this

court notices of meeting were sent to individual secured as well as unsecured creditors and also separately advertised in the Free Press Journal. The meeting of the secured creditors and unsecured creditors was accordingly held at the specified place and time. Mr. A P Kothari chaired the respective meetings who in turn has reported the result of the concerned meetings to this court.

l0. In so far as the meeting of the secured creditors is concerned, same was attended by six secured creditors of the petitioner company in person or through representative or by proxy. With consent of all the secured creditors present at the said meeting relevant documents were taken as read and the scheme was put to vote. On scrutiny by the scrutinisers, six ballot representing value of Rs.l7,657 lacs secured creditors were found in ballot box, five ballots representing value of Rs.l4,657 lacs secured creditors validly voted "For the Scheme", one ballot representing value of Rs.3,000 lacs secured creditors validly voted "Against the scheme". The report of the Chairman records that there were no invalid ballots. It is further noted that the scheme was approved by majority in number representing morel than 3/4th in value.

ll. In so far as the meeting of the specified unsecured creditors is concerned,it is stated that the same was attended by l2 unsecured creditors of the petitioner company through representatives. With the consent of all unsecured creditors present at the meting all documents were taken as read and the scheme was put to vote. It is stated in the report of the chair person that on scrutiny by the scrutinisers, l2 ballots representing value of Rs.24,5l2 lacs unsecured creditors were found in ballot box, eight ballots representing value of Rs.20,027 lacs unsecured creditors validly voted "For the Scheme", four ballots representing value of Rs.4,485 lacs unsecured creditors validly voted "Against the Scheme". It is stated that there was no invalid ballots and that the scheme was approved by majority of over 3/4th in value and in number.

l2. The petitioner company has thereafter approached this court by way of present petitions under section 39l of the Companies Act, l956 for sanction with or without modification of the arrangement embodied in the respective schemes of arrangements and for declaration that the same is binding on the petitioner company, its concerned secured and unsecured creditors as also for consequential reliefs.

l3. Ordinarily, as necessary formalities have been complied with and the respective proposed schemes have been approved by majority in number representing more than 3/4th for the value of the specified secured and unsecured creditors, this court would have no difficulty in acceding to the request of the petitioner company to sanction the arrangement embodied in the respective schemes of arrangement and declare the same to be binding on the concerned parties.But both these schemes are resisted by some of the secured creditors and unsecured creditors.

l4. I would first deal with the objections raised in respect of the proposed scheme of arrangement, regarding secured creditors. As is seen earlier the said scheme is essentially in relation to the six secured creditors named in the scheme. The scheme, according to the Regional Director, is not prejudicial to the interests of creditors and share holders and could be implemented. The objection, however, is registered only by the Units Trust of India (UTI), one of the secured creditors. According to the UTI it had invested (i) rs.600.00 lacs in l6% Non-convertible Debentures (NCDs) and (ii) Rs.200.00 lacs in l8.5% NCDs. The l6% NCDs are secured by the mortgage of the immovable properties of the petitioner company. In so far as the l8.5% NCDs is concerned, the petitioner

company with others on paripassu basis had agreed to create the security by paripassu charge on the immovable properties alongwith other secured creditors, but has failed and neglected to create the security in its favour. As a result, in so far as the claim arising out of l8.5% NCDs is concerned,has been treated as claim of unsecured creditors. In other words the petitioner company is taking advantage of its own wrong.It is then contended that the UTI had filed proceedings against the petitioner company for recovery of its dues to the extent of Rs.27,3l,5l,538 and the enforcement of their securities. These proceedings have been decided in favour of the UTI on 3lst March, 2004 and recovery certificate is also issued on l7th May, 2004. The UTI is therefore entitled to recover the said sum alongwith interest at the rate of l6% per annum from the petitioner company till payment or realisation. It is stated that UTI could not recover the said amount due to the pending proceedings under the Sick Industrial Companies (Special Provisions) Act, l985,hereinafter referred to as "SICA" in respect of the petitioner company. In so far as the merits of the proposed scheme is concerned, according to the UTI it will not recover even the principal amount of Rs.8 crores as the arrangement was of Rs 3.3 crores approximately towards its dues which are amounting to Rs.46 crores. The arrangement is by

payment in the form of cash of 75.6l lacs equity of Rs 24 lacs, NCDs Rs.60 lacs of Optional Fully Convertible Debentures (OFCDs) Rs l44.02 lacs. This amount would represent only 37.5% of the principal amount of Rs.8 crores with the result the UTI will have to suffer huge sacrifice which is not suitable to the business/regulatory requirements of the UTI. Besides the sacrifice of huge amount of repayment is spread over for long period of the NCDs and OFCDs. It is stated that the amount which will have to be sacrificed by the UTI is essentially the public money contributed by general public/ small investors.

l5. It is then stated that UTI is a separate class of creditors as their dues are secured by lst paripassu charge on the immovable properties and the second charge on movable assets of the petitioner company, for which reason it cannot be equated with the banks who have financed for the working capital requirement of the petitioner company.It is then stated in the reply affidavit that the petitioner company has deliberately made classification of creditors as secured and unsecured for their own convenience with malafide intention to reduce representation of the objectors-UTI. It is lastly stated that neither the corporate debts restructuring (CDR) mechanism nor the one time settlement (OTS) norms laid down by the

Reserve Bank of India are applicable to the case in hand. In substance, it is stated that the scheme of arrangement envisages huge waiver and long term tenure of repayment of the NCDs and OFCDs, which is prejudicial to the interest of large number of investors, for which reason the the request for sanctioning the proposed scheme of arrangement will have to be rejected and UTI should be permitted to proceed with the recovery proceedings against the petitioner company . During the arguments while reiterating the objections taken in the reply affidavit,the counsel appearing for the UTi emphasised that as the proceedings under the provisions of the SICA are pending before the AAIFR, jurisdiction of this court to sanction any scheme is excluded.In support of this submission reliance was placed on the decision of the Rajasthan High Court reported in l994(4)Company Law Journal 296 in the case of Union of India vs Krishna Mills Ltd. The learned counsel for the objector UTI has also relied on the decision of the Apex Court in the case of Navnit R Kamani and ors vs R R Kamani reported in AIR l989 SC 9 to contend that the objects and reasons for introduction of SICA Act of l985 will have to be kept in mind while considering the question whether the jurisdiction of the company court is excluded or not.

l6. It was then contended that assuming this court can still exercise its jurisdiction in this case,as it is open to the petitioner company to pursue the remedy before any of the forums, the petitioner company will have to exercise either of the remedy and cannot be allowed to pursue the remedy for similar reliefs before two different forums.In other words, according to the UTI the doctrine of election will have to be invoked. It is then contended that if the petitioner company were allowed to pursue the present remedy before this court that would virtually render the proceedings before the AAIFR fate accompli. In any case, this court would be required to undertake the exercise of considering the sanction of only partial arrangement and not consider the entire gamut so as to formulate a comprehensive scheme, which can be done only by the Board under the provisions of SICA. It is then stated that the scheme as propounded provides that the sanction of the scheme by this court will be subject to the order to be passed by AAIFR,in such a case this court should be slow to entertain the relief claimed in the petition;for it will create a situation of inconsistent orders passed by two different forums. It was lastly contended that the petition makes no disclosure about any scheme of arrangement in relation to unsecured creditors as a whole or specified unsecured creditors. That however, has been made only

after the objection was raised to the present scheme by the UTI. On the above arguments it was contended on behalf of the UTI that the petition should be dismissed and request of the petitioner company for sanction of the proposed scheme of arrangement be refused.

l7. I shall first deal with the question whether the pendency of the proceedings before the AAIFR under the provisions of the SICA would exclude the jurisdiction of this court to entertain the present petition to consider prayer for sanction of the proposed scheme of arrangement. This aspect came up for consideration before me in the case of Sharp Industries Limited decided on November l7,2005 being Company Petition No.460 of 2005, which was also under section 39l of the Companies Act for a scheme of compromise/ arrngement between the said company and its secured /unsecured creditors and equity share holders. After considering the exposition of this court in the case of National Organic Chemical Industries Ltd vs Nocil Employees Union reported in 2005(l26) Company Cases page 922, I had an occasion to observe as follows:

> " 16. I am in agreement with the view expressed by Justice S.U.Kamdar in the above decision. To get over this position, Counsel for the intervenors had placed reliance on the decision in the case of **K.Sitarama Raju (Supra)**, wherein, it is

observed that as soon as the reference under Section 15 is made to the BIFR, the BIFR is seized of the matter and in that case by virtue of Section 32 of SICA, the provisions of that Act would prevail notwithstanding anything contained in the Companies Act, 1956. In my opinion, this decision is of no avail to the intervenors. In the first place, the limited question that was considered by the Andhra Pradesh High Court in exercise of writ jurisdiction was: whether the BIFR has the power to restrain the company from effecting any change in the composition of the Board of Directors, including top managerial personnel pending decision on the question of rehabilitation of the Company. The statement of law occurring at Page 31 placitum (H) of the said decision as referred to above will, therefore, have to be considered in that limited perspective. In any case, I would prefer to agree with the view expressed by Justice S.U.Kamdar which is the correct statement of law. Viewed in this perspective, the objection that this Court has no jurisdiction to entertain the present proceedings in view of the pendency of the BIFR reference will have to be rejected. Anticipating this situation, perhaps, Counsel for the intervenors would then argue that even if the two proceedings were to be held as independent proceedings, even in that case, the present Petition will have to be rejected unless the Petitioner were to elect one of the available two remedies. There is no substance even in this objection. The question of election of remedy would arise when both the remedies provide for same relief. That is not the case on hand. Besides, as mentioned by Justice S.U.Kamdar, the scheme of two enactments operate in different spheres, though not inconsistent with each other. If it is so, the question of electing one of the two remedy does not arise."

l8. As mentioned earlier, the learned counsel for UTI had relied on the decision of Rajasthan High Court in the case of Union of India vs Krishna Mills Ltd

(supra). That was a petition for winding up of the company under sections 433(c) and 433(f) of the l956 Act with further prayer for appointment of the Official Liquidator as the liquidator of the company. Indeed, wide observations have been made in paras 8 and l0 to l2 of this decision. The relevant portion of the said paras 8, and l0 to l2 as under:

> "8.....It is,thus,clear that the l985 Act is designed as a special statute for making efforts to protect the sick industrial companies from death. As far as possible, attempts are to be made for revival of the company and only when the Board comes to the conclusion that revival is not possible, winding up proceedings can be taken by the High Court on a reference made by the Board. Being a special statute in relation to sick industrial companies, provisions contained in the l985 Act will prevail qua the general provisions contained in the Companies Act. The maxim Generalia specialibus non derogant will apply in such cases and the provisions of the l985 Act will be construed to be having overriding effect on the provisions of the l956 Act.
>
> l0. Thus, there is a clear exclusion of the provisions of the Companies Act and by virtue of section 22(l), no proceedings for winding up of an industrial company or for execution, distress or the like against any of the properties of the industrial company shall lie or be proceeded with further in accordance with the provisions of the Companies Act except with the consent of the Board or the Appellate Authority. The non obstante clause contained in sections 22 and 32 will prevail as against the non obstante clause contained in section 529A of the Companies Act for the following reasons:
>
> ll. Firstly, as already held hereinabove, the Sick Industrial Companies (Special Provisions)Act, l985, is a special statute qua the general provisinos contained in the

> Companies Act, l956,and being a special enactment, it shall prevail over the provisions of the Companies Act. Secondly, the non obstante clauses contained in sections 22 and 32 of the l985 Act have been enacted at a subsequent point of time and for that reason also, even if there is an assumed inconsistency in the two non obstante clauses, the latter non obstante clause would prevail. The Legislature must be deemed to be aware of the non obstante clause contained in the Companies Act when it incorporated the non obstante clause in sections 22(l) and 32(l) of the l985 Act. If, despite this knowledge, Parliament has thought it proper to enact the non obstante clause in the subsequent statute, there is no justification for curtailing the scope of these non obstante clauses by reference to the provisions of section 529A of the l956 Act.
>
> l2. It is also significant to notice that the chapter relating to the winding up of companies as contained in the Companies Act is intended to destroy the corporate personality of the company.The provisions contained in sections l6 to l9 read with section 25 of the l985 Act are intended to save the corporate personality. For this reason also the non obstante clauses contained in sections 22(l) and 32(l) shall prevail".

Relying on the above observations the learned counsel for the UTI would contend that once proceedings under the provisions of SICA are pending the jurisdiction of this court is completely excluded. It is not possible to accede to this submission. As is noted earlier similar contention has been considered by me in the case of Sharp Industries Limited and rejected. Besides,what is overlooked by the learned counsel is the conclusion recorded in para 25 of the said decision of the Rajasthan High Court which reads thus:

> "25. On the basis of the above discussion, it is held: (l) That the provisions of the l985 Act are special provisions qua the Companies Act, l956, and, therefore, the former shall prevail over the latter in case of inconsistency".

The ultimate conclusion recorded in this decision is the correct statement of law which is consistent with the view taken by our High Court in the case of National Organic Chemical Industries Ltd as well as Sharp Industries Ltd. The legal position is that the provisions of l985 Act shall prevail over the provisions of the Companies Act, l956 "in case of inconsistency" in a given subject.

l9. Besides, as is noted by our High Court the provisions of the two enactments operate in different spheres and the scheme in so far as the power of the High Court to grant sanction to the proposed scheme of arrangement is unaffected. Reliance is rightly placed by the learned counsel for the petitioner company on the decision of the Division Bench of our High Court reported in (2003) 45 SCL 475, in the case of Securities and Exchange Board of India vs Sterlite Industries (India) Ltd. The Division Bench of our

High Court was dealing with similar argument that in view of specific provisions in the SEBI Act, l992, the legislative intent was to exclude the jurisdiction of the forum under the Companies Act in respect of the provisions of section 77A of the Companies Act. The Division Bench of our High Court after examining the relevant provisions held that the legislative intention behind the introduction of section 77A is to provide an alternative method by which a company may buy-back upto 25 per cent of its total paid up equity capital in any financial year subject to compliance with sub-sections (2), (3),and (4). The Court observed that such provision does not supplant or take away any part of the pre-existing jurisdiction of the company court to sanction a scheme for such reduction under sections l00 to l04 and section 39l. In para 23 of the said judgement the court further noted that it is well settled that the exclusion of the jurisdiction of the court should not readily be inferred, such exclusion should be explicitly or clearly implied. It further observed that the provisions of section 77A was merely enabling provision and the court's powers under sections l00 to l04 and section 39l are not in any way affected. I find substance in the submission canvassed on behalf of the petitioner company that the purpose of the proposed scheme of arrangement is mainly to revive the company and infuse funds, which

approach will be consistent with the object of the SICA. The scheme on hand is intended only to scale down the debts referred to in the proposed scheme and thereafter to satisfy the pegged down debts with the assistance of the third company who has come forward to extend necessary financial aid so as to revive the petitioner company. Viewed in this perspective, it is not as if the proceedings on hand are in any manner inconsistent either with the objects or the provisions of the SICA Act.

20. There is yet another formidable argument pressed into service on behalf of the petitioner company. The learned counsel for the petitioner has invited my attention to the purport of section l8 of the SICA Act, which pertains to the scheme with respect to sick company providing for any one or more of the measures specified in sub-section(l) thereof. Assuming that the proposed scheme in relation to secured creditors was referable to one of the measures provided for in section l8(l) of the Act of l985;even so, for the nature of the proposed scheme, it would require the secured creditors to give concession or make sacrifice of the outstanding dues. The named secured creditors are the Banks and Financial institutions referred to in sub-section(l) of section l9 of the Act of l985.If it was sanction of a scheme simplicitor under section

l8 of the Act undoubtedly by virtue of sub-section (8) of section l8 of the Act of l985, the directions given by the forum under the provisions of the Act of l985 would not only bind the sick industrial company and the transferee company but also other companies as also share holders, creditors, guarantors and employees of the said company. However, as specified secured creditors qualify the description of the banks and financial institutions referred to in section l9(l) of the SICA, the matter will have to be viewed from different perspective. That is so because, section l9(4) makes it amply clear that if consent to the scheme is not given by any one of the person required to give such consent to the scheme, to provide financial assistance,the Board will have to adopt such measures including winding up of a sick industrial company. In other words, even if one bank or financial institution was to withhold the consent, rehabilitation of a sick industrial company by giving financial assistance will be ruled out.On the other hand the proposed scheme, even if opposed by such banks or financial institutions, can be sanctioned by this court and in that event the direction given by this court in exercise of powers under section 39l of the Companies Act will bind the non-consenting bank and financial institutions as well. In such a case drastic order of winding up of the sick industrial

company will not be resorted to. Viewed in this perspective the petitioner company may be justified in contending that the remedy under section 39l, as is invoked by the petitioner is the proper remedy and directions passed in the said proceedings by this court will be in no way inconsistent with the scheme or the provisions of the SICA Act.

2l. The next argument of the obstructionist UTI is that it was a separate class of creditors, in as much as UTI had invested Rs.600 lacs in l6% NCDs which are secured by mortgage of immovable properties. It had also invested Rs.200 lacs in l8.5% NCDs for which the petitioner company had agreed to create paripassu charge in its favour on the immovable properties. It is then submitted that the classification of secured and unsecured creditors made by the petitioner company was with malafide intention to reduce the representation of the obstructionist UTI. It was also argued that the UTI has already secured recovery certificate against the petitioner company in terms of the order passed by the Debt Recovery Tribunal, for which reason it stood in a different category . None of these submissions commend to me. The first grievance has been rightly countered by the petitioner company by asserting that the petitioner company cannot be blamed for not creating the said charge of

UTI in the immovable properties for the simple reason that the other secured creditors did not consent for such charge being created in favour of UTI. Even the argument of UTI that the classification of secured and unsecured creditors is unrealistic,cannot be accepted. It is well established that such classification is permissible, It is not possible to accept the argument of UTI that they have been wrongly classified alongwith other 5 secured creditors specified in the scheme of secured creditors. There is no dispute that UTI had invested Rs 600 lacs in l8% NCDs which are secured by mortgage of the immovable properties of the petitioner. The interest of UTI was the same as that of other five specified secured creditors. All these secured creditors were required to provide concession or sacrifice the outstanding dues receivable by them from the petitioner company. They therefore formed a homogenous class and have been rightly classified. The argument of UTI that recovery certificate has been issued in its favour for which it stands in a different category will have to be stated to be rejected. Similar contention was considered by me recently in the decision in the case of Sharp Industries Ltd (supra). It will be apposite to advert to the exposition in para 2l of this decision which reads thus:

" ......In so far as the former objection is concerned, it is well settled that merely because decree has been passed in favour of the creditor, he would not constitute different class of unsecured creditor. This position is fortified from the purport of Section 390(c) of the Act which provides that unsecured creditors who may have filed suits or obtained decrees shall be "deemed to be" of the same class as other unsecured creditors. There is also authority to support this position, reported in **AIR (29) 1942 Cal.442 in the case of Haricharan Karanjai vs. Ulipur Bank.** Insofar as the latter submission is concerned, the fact that Videocon International Limited had only one time transaction with the Petitioner, cannot be the basis to treat them as separate class or subclass of the unsecured creditors. Counsel for the said intervenor would, however, place reliance on the decision of the Madras High Court in **D.A.Swamy (supra)** wherein it is observed that broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. It is then observed that the group styled as a class should, ordinarily, be homogeneous and must have commonality of interest and the compromise offered to them must be identical. The exposition in this decision is of no avail to the intervenor. It will be useful to advert to Para 38 of the decision of the Apex Court in the case of **Miheer H.Mafatlal (supra)**, wherein, it is observed that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. It is then observed that this clearly presupposes that if the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any subclass of members which has a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a subclass would at all survive. It is then observed that unless a separate and different type of Scheme of Compromise is offered to a subclass of a class of creditors or shareholders otherwise equally circumscribed by the class, no

> separate meeting of such subclass of the main class of members or creditors is required to be convened".

22. That takes me to the grievance of UTI that it is required to make huge sacrifice and would receive only upto 37.5% of the principal amount in terms of the proposed scheme, which will not be suitable to its business/ regulatory requirements. The fact that the investments made by UTI constitutes contribution by small investors from general public by itself cannot be the basis to interdict the proposed scheme. The other five secured creditors are also public undertakings such as Bank of India, Bank of Baroda, and Union Bank of India. Similar position applies to them. Nonetheless, it was their wisdom to accept the proposed scheme because the amount referred to in the proposed scheme was not only guaranteed as to be received in cash and by way of equity shares of Wanbury Limited,who has come forward to revive the company, though the amount receivable will be pegged down only to the extent of 37.5% of the principal amount. In so far as the argument that UTI was secured by lst paripassu charge on the immovable properties in relation to the investments in NCDs is concerned, clearly overlooks that even by disposal of the immovable properties of the petitioner,UTI would not be in a position to satisfy its entire outstanding

dues. Whereas, under the scheme, not only the sale proceeds of immovable properties have been offered to the secured creditors but Wanbury Limited, who is a third company, has assured of infuse cash to the extent of Rs.2,40,64,470 in addition to providing for 64,668 equity shares of Wanbury Limited of Rs.l0 each issued at the premium of Rs.l40 each issued and allotted by Wanbury Limited which is valued in the sum of Rs.97,00,200 and zero coupon NCDs issued and allotted by Wanbury Limited in the sum of Rs.2,42,50,000,besides zero coupon OFCDs issued and allotted by Wanbury Limited for Rs.5,82,00,000 only. This provision was in addition to the sale proceeds available from immovable property, which is quite substantial in nature and would not become available unless assistance offered by Wanbury Limited was to be accepted. Indeed, the entire claim of UTI or for that matter other secured creditors is not being satisfied but in the given situation, the offer as made appears to be fair and reasonable and would subserve the interest of all concern, which in turn will result in rehabilitation and revival of the petitioner company, which is already before the BIFR for last over 8 years with no better offer forthcoming. If the proposed scheme is not to be accepted, it is obvious that the recommendations made by the BIFR for winding up of the petitioner company will be inevitable, which situation

is avoidable if the proposed scheme is accepted. Indeed, UTI may be justified in contending that neither the corporate debts restructuring mechanism nor the one time settlement norms laid down by the Reserve Bank of India are applicable or suitable to business / regulatory requirements. However, keeping in mind the interest of all concern, the appropriate course is only to sanction the proposed scheme and not interdict the same. Such direction if passed, same will bind the objector UTI by virtue of the expansive provisions of section 39l of the Companies Act.

23. The next grievance of UTI that the proposal of repayment offer under the said scheme is spread over for a long period as a ground to refuse sanction of the scheme, also does not commend to me. The period specified for repayment is a package offered under the scheme. The secured creditors were,on implementation of the scheme, to get amounts in cash as well as equity shares of Wanbury Limited. Besides, the provision for the amount receivable out of the sale proceeds of immovable property would also become available to the secured creditors. Understood thus, the provision for repayment modalities spread over after sometime, cannot be the sole basis to reject the request to sanction the proposed scheme.

24. It was next contended that because of pending proceedings before the AAIFR it will be unjust and unfair for this court to interfere at the instance of the petitioner company. This is so because in the proceedings before the AAIFR all the aspects of the matter can be considered and AAIFR will be in a better position to propound a comprehensive scheme which will protect the interest of all concerned, whereas the present scheme only represents or relates to the interest of the named secured creditors and will be partial arrangement. Besides, if the scheme was given effect to the substratum of the company will be lost or disposed of, thus making the pending matter before the AAIFR fate accompli. In my opinion, there is no substance in the apprehension expressed by UTI . The present scheme is clearly a scheme limited to scaling down the debts of the named secured creditors and then to take measures to satisfy the pegged down debts with the assistance of Wanbury Limited. The concession or sacrifice to be made by the concerned secured creditors will result in reviving the petitioner company. As is noted earlier, it is only in the proceedings under section 39l of the Companies Act, direction given by this court would bind UTI who has not consented for offering concession or sacrifice. The apprehension that the matter before the AAIFR will become fate accompli, also does not commend to me.

The matter before the AAIFR is essentially to challenge the order passed by the BIFR recommending winding up of petitioner company. The fact that implementation of the present scheme, even if sanctioned, to be made subject to the order of the AAIFR, will make no difference. Such provision in the subject scheme is but appropriate. Unless the order of the BIFR was to be set aside by the higher authority provided under SICA Act l985, question of enforcing the proposed scheme to be sanctioned by this court will not arise. That arrangement, however, does not mean that there is possibility of inconsistent orders being passed. If the proposed scheme is approved, it is bound to revive the financial position of the petitioner company so as to bring it outside the purview of sick industrial company. If the offer intended under the proposed scheme is found appropriate, then the authority under the provisions of the SICA will consider passing of necessary orders to subserve the interest of all concerned. Viewed in this perspective, I find no substance in the objection that because of pendency of proceedings before the AAIFR the request made in the present petition should not be granted.

25. It was lastly contended on behalf of UTI that no disclosure has been made in the petition that any

scheme was proposed in relation to the unsecured creditors. Although UTI may be justified that no disclosure about the same in relation to unsecured creditors is made in the present petition, that, however, is not non-disclosure of material facts relating to the company such as latest financial position of the company, last auditors report on the accounts of the company, pendency of any investigation proceedings in relation to the company under sections 235 to 25l, within the meaning of proviso to section 39l(2) of the Companies Act. If it is so, non disclosure of that fact cannot be a ground for dismissing the present petition. In as much as, all the material facts required by section 39l are already notified in the petition and complied with.

26. Accordingly, in so far as the Company Petition no.469 of 2005 is concerned, as there is no other objection which can be said to be fatal to the maintainability of the petition, same will have to be allowed in terms of prayer clauses (a) and (b).

27. That takes me to the second set of the petition which is in relation to the proposed scheme of arrangement regarding "specified unsecured creditors". In all l8 unsecured creditors are named as unsecured creditors for the purpose of this scheme. Even in

relation to this petition, the Regional Director has filed affidavit opining that the scheme is not prejudicial to the interest of the creditors and shareholders and appropriate orders may be passed. Ordinarily, as all the requisite formalities have been complied with by the petitioner company the proposed scheme ought to be sanctioned. However, the same is objected to by five creditors of the petitioner company. Out of these five creditors, three creditors are not amongst the l8 unsecured creditors named in the scheme. One of them is Tata Finance Ltd who had arrangement of bill financing facility with the petitioner company, 2nd is Pedilite Industries Ltd who had given inter corporate deposit of Rs. l0 crores to the petitioner company and the 3rd is Ludhram Finance Ltd who had given advance to the petitioner company. The said three companies have not been named in the unsecured creditors for the purpose of the present scheme. As is stated by the petitioner the present scheme relates to the named unsecured creditors, essentially being banks and financial institutions. The above named three companies do not qualify as banks and financial institutions to be named as unsecured creditors for the purpose of the present scheme. The other objectors to the proposed scheme are UTI and Indus Ind Bank Ltd. These two have been named and described as unsecured creditors in the

proposed scheme. The material portion of the scheme is already extracted in the earlier part of this judgment.

28 I shall now advert to the objections taken by the respective objectors. The Pedilite Industries Ltd has filed two affidavits before this court dated l8th August 2005 and 29th August 2005. The substance of the objection is that they are also part of the class of unsecured creditors and there is no tangible reason to single out them. It is then contended that the proposed scheme is unfair and against the public interest. The second objector is Tata Finance Ltd who has caused to file two affidavits before this court dated l9th August 2005 and l6th September 2005 respectively. The substance of the objection is that they had offered bill financing facility.As the petitioner company failed to discharge its obligation they were required to resort to proceedings in which an award has been passed whereunder the petitioner company is liable to pay the sum referred to in the award as well as interest at the rate of l8% p.a. from 28th August 200l. The decree, however, could not be executed as proceedings before the BIFR were pending in respect of the petitioner company being sick industrial company. This objector alleges that the petitioner company has defrauded other unsecured

creditors. Criminal prosecution is also pending against the petitioner company and its directors under the provisions of Negotiable Instruments Act. It is alleged that Wanbury Limited was earlier known as Pearl Organics Limited. The petitioner company has transferred its assets to the said Pearl Organics Ltd so as to defraud its creditors. It is alleged that the promoters of the petitioner company and Wanbury Limited have common promoters.The said Wanbury Limited is nothing but an alter ego of the petitioner company.

29. The third objector is Budhriani Finance Ltd who has caused to file an affidavit of the authorized person dated l9th September 2005. The substance of the objection is that the said objector had advanced finance to the petitioner company which has been defrauded. The objector has therefore filed company petition for winding up of the petitioner company which is pending before this court being Company Petition No l75 of l997 having admitted on 20th April l998. It is stated that the petitioner company has fraudulently not added the name of this intervener in the list of unsecured creditors referred to in the scheme.

30 The next two objectors whose names are found in the list and described as unsecured creditors have also

caused to file affidavits opposing this petition. UTI has filed affidavit of its authorized officer dated l5th September 2005 and Indus Ind Bank Ltd has filed affidavit of its authorized officer dated l9th September 2005. In so far as the later is concerned it is stated that the criminal proceedings against the petitioner company and its directors are pending. Besides, company petition for winding up is also pending in respect of the petitioner company. In so for as UTI is concerned it is alleged that in the proceedings before the Debt Recovery Tribunal adopted by UTI, an order has been passed for recovery of certain amount against the petitioner company alongwith interest at the rate of l6% p.a. and on that basis the recovery certificate has been issued on l7th May 2004. However, the recovery certificate could not be enforced because of the pending proceedings before the BIFR. In so far as the merits of the scheme it is stated that the scheme, if approved, will require the said UTI to sacrifice huge amount and the repayment is spread over a long period to the NCDs and OFCDs. That the proposed scheme is not viable within the business and regulatory requirements of UTI. Besides, the classification of creditors made is with malafide intention to reduce the representation of UTI. More or less the same objections have been taken by UTI as raised in

relation to the petition sanctioning the scheme of arrangement regarding secured creditors.

3l The main arguments were canvassed by Mr Virag Tulzapurkar, counsel appearing for the petitioners. Mr.Sham Mehta, counsel appeared for UTI. Mr. Birendra Saraf appearing for Interveners Pedilite Industries and Pedilite Ind Ltd Ltd, Mr Shrikant Chavan for Indusind Bank and Mr Damani adopted the said arguments. During the course of the argument,besides reiterating the stand taken in the reply affidavits, it was argued that even if the proposed scheme has been approved by the requisite majority as required by law that does not mean that this court cannot refuse to sanction the proposed scheme. This court will have to scrutinize the material on record to ascertain whether the scheme is fair and reasonable and in public interest. In support of this submission, reliance was placed on the decision in the case of Sakamari Steel and Alloys Ltd reported in l98l (Vol 5l) Company Cases page 266.

32 Before I deal with the arguments on merits of the proposed scheme, it will be necessary to advert to the preliminary objections raised on behalf of the petitioner about the locus of the three objectors who are not named as unsecured creditors in the proposed

scheme.Relying on the decision of Gujarat High Court in the case of Gujarat Lease Financing Ltd (2002) 50, CLA l50(Guj), it was contended that the said objectors - unsecured creditors have no locus standi to oppose the proposed scheme. In this decision similar objection regarding locus standi was considered. The court found that the concerned banks were not offering any compromise nor any of their legal rights were required to be waived by the banks. It was noted that the interest of concerned banks was not affected by the scheme. In this context the question of locus standi of banks was raised and answered against the banks. In my opinion, in the present case, however, the objectors are justified in contending that they have locus standi to appear in this case proceedings because they constitute general class of unsecured creditors. It is open to them to agitate before this court that the unsecured creditors named by the petitioner company is not properly carved or there is no tangible basis to carve out such selective unsecured creditors as a class. Besides, it is open to them to contend that the scheme, if approved and implemented, it is likely to affect their interest in future. This is so because, the assets referred to in the proposed scheme will be disposed of and will not be available to those class of unsecured creditors for ever. Reliance has been rightly placed on the

observations of this court in the case of ICICI Bank Ltd reported in 2002 (4) Bombay Cases Reporter page 403. In para 9 of this decision the court observed that where the arrangement is purely between the company and its members, not adversely affecting the creditors or any class of them, the court is not bound to convene a meeting of the creditors. It is further observed that,however, where the arrangement between the company and its members is likely .to adversely affect the creditors, it would be proper for the court to exercise its judicial discretion to convene the meeting of the creditors, unless majority of the creditors representing 3/4th in value of the creditors have otherwise given consent for the same. In para l3 of the judgment while disagreeing with the view expressed by the Delhi High Court, the learned single Judge of this court has held that the creditors have right to participate in the process of consideration of the scheme of arrangement between the company and its members. Section 39l(l) gives a discretion to the court to convene a meeting of the creditors or any class of them and that the court would exercise the discretion by convening a meeting of creditors if the creditors are likely to be adversely affected by an arrangement between the company and its members. In para l4 of the said decision, the court has observed that it is duty bound to consider the interests of all

the creditors. What importance should be given to the fact that the creditors are likely to be affected would vary from case to case but the Judge would certainly examine whether the creditors are adversely affected or not as the relevant circumstance. Reliance is then placed on the decision of our High Court in the case of Mayfair Limited and Zodiac Clothing Co Ltd reported in 2004(2) BCR 235. The court had rejected the objection of locus standi of creditors. The petitioner therein had argued that the creditor who was not affected at all has no right to object to the scheme of arrangement by way of an amalgamation.That,however,does not mean that the unspecified unsecured creditors were entitled to attend the meeting convened to consider the proposed scheme by the specified class of unsecured creditors. They may be, however, entitled to appear before this court when the proposed scheme is placed for sanction and argue that the class was not properly created or that they were unjustly kept out of the class of unsecured creditors in respect of which the proposed scheme was to be considered. It is also open to them to argue that their interest was adversely affected or is likely to be adversely affected. These aspects will have to be addressed by the court,if raised.

33. The grievance of the unspecified unsecured creditors in this case,however, is untenable. The material on record including affidavits filed by the petitioner company make it amply clear that the proposed scheme in relation to the specified unsecured creditors was confined to the banks and financial institutions so as to scale down the debt receivable by them from the petitioner company and to provide for arrangement to satisfy the scaled down debts.

34. The grievance of the objectors that the decree/ award has been passed against the petitioner in the proceedings resorted to by them, will make no difference. In my earlier part of the judgment, I have already answered this aspect to hold that the creditors who incidentally have secured decree, will have to be considered on par with the other creditors. In this case, the question is whether the objectors who have not been shown as specified unsecured creditors in the proposed scheme are justified in contending that they have been unjustly left out, though were on par in all respects with the specified unsecured creditors referred to in the proposed scheme. I have no hesitation to answer this issue against the objectors. From the materials on record I am satisfied that the proposed scheme is in respect of

the specified unsecured creditors who are banks and financial institutions, standing on different footing all together than the ordinary class of general unsecured creditors. Their interest is common and homogeneous class of persons. My attention has been rightly invited to the observations of the Apex Court in para 38 of the decision in Miheer H Mafatlal vs Mafatlal Industries Ltd,AIR l997 SC 506. Reliance is also placed on the observations of the Gujarat High Court in the case of Gujarat Lease and Financing Ltd (supra). What should constitute a class has been a matter of debate. In para 24 of this decision, the Gujarat High Court while making reference to Buckley on the Companies Act, l3th edition, page 406, noted that it is formidable difficulty to say what constitutes a "class" of creditors. The creditors composing the different classes must have different interest. When one finds a different state of fact existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes. "Class" must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. It is then observed that speaking very generally, in order to constitute a class, members belonging to the class must form a homogeneous group with commonality

of interest. There can be different groups within a class. Even if there are different groups within a class the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. It will be useful to refer to the decision of the Division Bench of our High Court in the case of Darshana Praful Kenia and ors vs. Alstom Power India Ltd and ors, reported in 2003(vol ll6) Company Cases page l.This court after considering the settled legal position has observed thus:

> "The cases which were cited before us do not give a comprehensive definition as to what constitutes a "class" of members or creditors.It is a formidable difficulty to define as to what constitutes a class. Whether a particular group of members or creditors would form a class distinct from other members or creditors would largely depend on the facts and circumstances of each case, the court being required to consider several factors.We would refrain from making an attempt to comprehensively define what constitutes a "class".We would however, so far as is necessary for the decision of this case, state the factors which would generally be taken into consideration by the court in deciding whether a person or group of persons form a separate class so as to require convening of a separate meeting of such class.
>
> (i) In the case of shareholders, the Act recognizes only two classes, namely, equity shareholders and the preference shareholders.Though further sub-classification amongst the equity shareholders or preference shareholders is not impermissible, the mere fact that the

equity shares (equity or preference) are issued at different times would not make them a different class. Similarly, the mere fact that the preference shares are redeemable on different dates would not make them shares of different classes.However, in some cases, the equity shares which are fully paid up and equity shares which are partly paid up may form a different class like where they are to be or exchanged for the shares of the transferee company to be issued in different proportions depending upon their paid up value.

ii) One of the tests t determine whether the two or more groups of members or creditors form a different class is whether the same scheme of arrangement or compromise offers the same terms to all or whether different terms are offered.If the scheme offers to the two groups of members or creditors different terms of arrangement, they would generally form a different class.

iii) Another test is to see whether the rights of the two or more groups of members or creditors are so dissimilar that they cannot reasonably be expected to have a common interest and are not likely to consult together to have a common view of their common interest. If their interests are so dissimilar that they are reasonably unlikely to take the same view about the scheme and would reasonably feel that any one view would unreasonably benefit one or unreasonably prejudice the other then they would form different classes.

iv) The private interest of one or a group of members or creditors vis-a-vis the directors of the company or the persons in the management of the company are taken for the purpose of classification. As held by the apex court in Miheer H Mafatlal’s case (l996) 87 Comp Case 792, AIR l997SC 506, the member or members or creditor or creditors claiming right against one or more directors of the company cannot claim that he or they constitutes a separate class only by reason of having a separate private right or interest.

v) While in the case of shareholders, the

court would not generally favour a further sub-classification other than equity share holders and preference shareholders, there may be need for making a further subclassification in the case of creditors of the company. Apart from the broad distinct classes like secured and unsecured creditors,there can be further subclasses,In the case of secured creditors, some creditors may have sufficient security or specific assets or assets which are greater than the amount of their debt while others may have security of other specific asset or assets which are not sufficient to meet their credits. Some secured creditors may have a first charge, some may have a second or subsequent charge. Some may have specific charge attached to a particular piece of property in existence on the date of creation of the charge and some may have only floating charge hovering over and floating with the property intended to be affected,,until it fastens on a specific property o happening of some event. It would depend upon the facts and circumstances of each case,whether there would be any need for further subclassification even amongst the secured creditors.. Amongst unsecured creditors also there can be subclasses. it was held in the case of Sovereign Life Assurance Co (l892) 2 QB 573 (CA) that the creditors whose policies had matured and who had crystallized claim would form a different subclass from the creditors whose policies had not matured and whose claims were not crystallized. ,Amongst unsecured creditors, some may be preferred like the Government, or the workers who may have a statutory preference over others.It is difficult to enumerate the circumstances under which different creditors, secured or unsecured, would form a separate subclass. But, the general principle would be the same namely whether the interest of the creditors who claim to belong to a different class are so dissimilar to the interest of the other creditors that it would be impossible for them to sit and consult together and take a common view of their common interest".

35. Applying the principles referred to above, in this case, as the scheme of arrangement or compromise

offers the same terms to all the specified or named unsecured creditors referred to in the scheme they have been treated as different class of unsecured creditors as they will have to exercise their rights not in dissimilar manner and are reasonably expected to have common interest. In the above decision it is observed that amongst unsecured creditors, some may be preferred like the government or the workers who may have a statutory preference over others. Suffice it to observe that the specified or named unsecured creditors in the proposed scheme are banks and financial institutions, the rights and interests of objectors who have been left out were in no way similar to that of named unsecured creditors. That being the position, the classification done by the petitioner company keeping out three objectors, who have approached this court as interveners, from the described unsecured creditors in the scheme, cannot be said to be unjust or unreasonable. To get over this position the learned counsel for the objectors would contend that no factual foundation has been laid before this court as to why l8 institutions have been selectively identified as described unsecured creditors. No assertion has been made in the petition that each of them are banking companies or financial institutions. The argument seems to be attractive. However, no specific objection is taken in the reply

affidavit that no assertion has been made that all l8 institutions are banking companies or financial institutions.Indeed, in the reply affidavits filed it is vaguely stated that there was no tangible basis to leave out objectors before this court from the said list. In response to the said reply affidavits,the petitioner company has filed rejoinder affidavits clearly asserting that the l8 institutions named as described unsecured creditors in the proposed scheme are clubbed together being banks and financial institutions and the proposed scheme was essentially for banks and financial institutions for which reason the objectors have been left out.

36. The learned counsel for the objectors have placed reliance on the decision of Gujarat High Court in the case of Maneckchowk and Ahmedabad Manufacturing Co Ltd reported in l970 (40) Company Cases 8l9. In this judgment at page 873 the test to be applied for creating class of creditors has been discussed with reference to the quotation from Buckley on the Companies Acts, l3th edition. It is not possible to suggest that other institutions can be equated with the banks and financial institutions. Reliance is also placed on the decision in the case of Wipro Finance Ltd vs Suman Motels Ltd, reported in l999(4) BCR l. Reference was made to the observations in para

7 of this decision which reiterates the legal position as has been noted earlier by the Division Bench of our High Court referred to above.

37 It was also contended on behalf of the objectors that there is no material to show that the institutions referred to at serial nos 7,l2,l3,l4 and l6 were banking companies. Once again this submission is put forth only across the Bar. No such specific objection has been taken in the reply affidavit filed by any of the objectors. In view of the general assertions made by the objectors in their respective reply affidavits, the petitioner company has asserted on affidavit that the described unsecured creditors in the proposed scheme are banks and financial institutions and therefore have been constituted as a class.Suffice it to observe that going by the names of described unsecured creditors mentioned in the proposed scheme said institutions at serial nos 7,l2,l3,l4 and l6 are engaged in either banking or financial institutions for which reason they have been specified as a separate class alongwith described unsecured creditors.

38 It was contended on behalf of the objectors that the arrangement which is propounded is an eye wash. It is alleged that Wanbury Limited was earlier known

as Pearl Organic Limited. The petitioner company has already transferred its assets to the said Pearl Organic Limited. It is also alleged that the promoters in the petitioner company and Wanbury Limited are common. All these allegations have been countered by the petitioner company. It is stated on affidavit that there are about 4000 share holders in Wanbury Limited which is a public limited company and no properties are of the promoters of the petitioner company as alleged. The petitioner has also stoutly denied that the petitioner alongwith Wanbury Limited have been at all intention to defraud any one from whom the petitioner company had taken assets on hire purchase basis as alleged or otherwise. It is also denied in the affidavit that the petitioner company in connivance with Pearl Organics Ltd has transferred all its assets to the company which is privately held by the promoters of the petitioner company with a view to defraud the creditors of the petitioner as alleged. There is no reason to doubt the said assertions made by the petitioner company. No further material has been produced by the objectors to make good the allegations that the attempt is only to defraud the left out unsecured creditors. On the other hand, the proposed arrangement clearly provides that Wanbury Limited will infuse funds to revive the petitioner company by bringing in cash of Rs.l50.03 lacs.

Besides, the sale proceeds with regard to the immovable property of the petitioner company will be shared by the described unsecured creditors in specified quantity and manner provided in the scheme. The argument of the objectors that as they do not form part of the described unsecured creditors,their interest will be permanently prejudiced as the immovable assets will not be available for them for ever. This submission clearly overlooks that the immovable assets which are referred to in the proposed scheme are already mortgaged to banks and financial institutions. If the secured creditors were to proceed against the said immovable property including on winding up of the company, the unsecured creditors will not receive any amount whatsoever out of the sale proceeds as the claim of secured creditors would far exceed the value of sale consideration to be received. Viewed in this perspective the provision made in the proposed scheme earmarking certain percentage of the sale proceeds to the described unsecured creditors can be no basis to doubt the fairness of the scheme.

39. In so far as the named unsecured creditors are concerned, two of them, who have objected before this court, to the proposed scheme, have clearly overlooked that making available certain percentage of sale proceeds of immovable assets of the petitioner company

is bonus offer to these category of unsecured creditors, which, in law, they may not be able to secure, in the event the sale proceeds were to be in insufficient to cover the claim of the secured creditors. Besides, the cash flow of Rs.l50.03 lacs has been provided to GPI claim of the described unsecured creditors in terms of the scheme. The principal opponent amongst the described unsecured creditors was UTI. Most of the grievances,which have been made on behalf of UTI as secured creditors have been reiterated as unsecured creditors. I have addressed these contentions in the earlier part of my judgment. For the purpose of brevity I would adopt same reasons while rejecting the objections of UTI as described unsecured creditors. On the other hand it is apposite to refer to the decision, which was cited by the learned counsel for one of the objectors, of the Gujarat High court in the case of Maneckchowk and Ahmedabad Manufacturing Co Ltd (supra). While dealing with ground as to whether the scheme in that case was not commercially and economically viable or feasible and is in fact unfair and unreasonable ,the court at page 90l observed thus:

> "... How should the court approach a scheme of compromise and arrangement submitted for its sanction which is shown to have been approved by a statutory majority of creditors and members who are directly affected by the scheme. The burden, of course, of showing

that the scheme is a fair and reasonable one initially lies on the petitioner.The petitioner must prima facie show that the scheme is pre-eminently fair and reasonable as a prudent and reasonable shareholder would approve of and not object to. In order to show prima facie that the scheme is fair and reasonable, it is open to the petitioner to submit that due weight must be accorded to the fact that the majority has recorded a decision in favour of the scheme and the court must not lightly ignore or set aside that decision. In In-re Sidhpur Mills Co Ltd Miabhoy J. (as he then was) in this connection observed as under:

"Therefore the scheme has not to be scrutinised by the court with that much care with which an expert will scrutinise it, nor will it approach it in a carping spirit with a view to pick holes in it. If the majority is acting in a bonafide and honest manner and in the interests of the class that it purports t represent, then, if the scheme is such as a fair minded person,reasonably acquainted with the facts of the case, as prevailing at the time when the scheme was sponsored and approved,can regard it as beneficial for those whom the majority seeks to represent, then, unless there are some strong and cogent grounds to show that the scheme was conceived,designed or calculated to cause injury to others, the court will ordinarily sanction it, rather than reject it"

This must be the approach of the court while examining the scheme and the court should, keeping in view all the aspects of the matter, prefer to living scheme to compulsorily liquidation bringing about and end to a company. Reference may be made to Lawrence Dawson v J.Hormasji, Cunliffe J. has observed as under:

"The court is of course not a mere machine for registration. It will look into the proposed scheme much as a court of appeal will canvass, if asked to do so,the decision of a jury, to ascertain if there was reasonable evidence to support their verdict; but it will, I think, always also prefer a living scheme to a compulsory liquidation

> bringing about an end to a company, and usually without any hope of payment in full".
>
> The court is exercising its discretion under section 39l(2) must treat it as cardinal that its function does not extend to usurping the view of the members or creditors. It must look at the scheme to see that it is a reasonable one and while so doing, the court will be strongly influenced by a big majority vote and the reasons which actuated the contesting creditors in opposing the scheme. None the less it is essential that the scheme must be a fair and equitable one thought it is none of the business of the court to judge upon the commercial merits which in fact is the function of the creditors and members".

40. The legal position has been articulated by the Apex Court in the case of Miheer H Mafatlal (supra) in para 28 thereof as to the parameters to be kept in mind by the court while undertaking scrutiny of the scheme. Applying these principles, it is not possible to take a view that the proposed scheme is unfair and/or unreasonable to any of the described unsecured creditors, or prejudicial to their interest or that they have been treated differently than the class of creditors who are similarly situated like them. Thus understood, the scheme as proposed will have to be approved.

4l. One of the described unsecured creditor objected to the proposed scheme on the assertion that there was dispute about the outstanding amount payable to it as on 3lst July 2005. That assertion has been countered

by the petitioner company in its rejoinder affidavit dated 30th August 2005. In para 4 of th affidavit it is stated thus:

> "Whereas there is no dispute on the principal amount outstanding the consideration being paid to the Unsecured Creditors in the scheme of arrangement as on basis of principal amount outstanding and not on the amount due. I deny that as on 3l.7.2005, the outstanding amount due to the IndusInd Bank Ltd, in their accounts stands Rs.227.57 lacs with further interest at 25.25% p.a. till realization as alleged. I say that in the meeting held on llth day of June 2005 the representative of the IndusInd Bank Ltd, Mr Fernandes has stated to the Hon'ble Chairman of the meeting that their claim is Rs.90 lacs, which has been recorded by the chairman's report dated 2nd day of July 2005,while now the Bank is claiming in their affidavit, the said amount of Rs.227.57 lacs. These shows that Bank is now aware of the amount due and is merely speculating".

42. What flows from this affidavit is that in the proposed scheme the outstanding claim of respective described unsecured creditors is the principal amount outstanding "as on 3lst July 2005". In so far as the concerned objector is concerned, the amount mentioned in the books of account against its name represents principal amount outstanding on 3lst July 2005 and there is no controversy with regard to that fact. There is force in the argument canvassed on behalf of the petitioner company that even if the amount due as claimed by the said objector was to be reckoned as Rs.227.57 lacs, for the purpose of computing the

voting percentage in the scheme. The total percentage of voting against the scheme was l8.53%. Even if the additional figure as claimed by the objector of Rs.227.57 lacs is to be accepted as it is, the total percentage voted against the scheme will not exceed l8.83%, which fact is rightly asserted in para 5 of the affidavit of the petitioner company dated 30th August 2005. In other words, even on that assumed amount of objector, it will not make any difference to the voting pattern to affect the proposed scheme as has been approved by majority of 3/4th in value.

43. The next grievance of the objectors was that the assets of the petitioner company at Patalganga have not been shown in the balance sheet. Similarly, the assets of the petitioner company at Sakhinaka and Turbhe are not mentioned in the secured list in schedule IV of the accounts. I find substance in the argument of the petitioner that the objectors are raising points which are frivolous. The objectors are taking advantage of the incomplete details mentioned in the schedule IV of the accounts. It is stated that the office premises referred to in schedule IV at page l92 are none else but the premises at Sakhinaka. The property at Turbhe are already described as factory building. Similarly, the assets at Patalganga are described under the caption "capital work in progress"

which is the last item of the same list. Thus the stand taken by the petitioner company is supported by the details and description given in schedule III at page l9l of the paperbook. Accordingly, even this objection is only to be stated to be rejected being devoid of any merit.

44. The grievance of the unsecured creditors who are not part of the described unsecured creditors in the proposed scheme-that their interest has been totally marginalised, is without any substance. True it is that in the pleadings as filed in the present petition on behalf of the petitioner before this court, no clear stand has been taken with regard to that class of unsecured creditors. To get over this draw back the learned counsel for the petitioner company, on instructions stated during the course of argument that such class of left out unsecured creditors in the scheme will be paid by Wanbury Limited in cash to the extent of 4% of their principal amount outstanding as on 3lst July 2005, as one time settlement, towards full and final settlement of their claim. The learned counsel for the petitioner stated that a separate scheme with regard to such left out unsecured creditors is being articulated and will be processed in accordance with law. There is no reason to doubt the correctness of the submission canvassed on behalf

of the petitioner company on the above terms. In other words, it is obvious that a separate scheme for the left out unsecured creditors will be processed in accordance with law. Indeed, the said scheme will be interdependent for the meaningful accomplishment of the objects of the rehabilitation and revival of the petitioner company with the assistance of Wanbury Limited. It is not necessary for this court to dilate on the question as to whether such scheme will apply to other creditors or otherwise. Suffice it to observe that the scheme as proposed is fair and reasonable and makes humble attempt to overcome the losses suffered by the petitioner company resulting in becoming a sick industrial company. If this attempt succeeds, the petitioner company will be revived which will enure to the advantage of all concern. No fruitful purpose would be served if the petitioner company is to be wound up, which is the only course available, in the event of failure to properly implement the proposed scheme.

45. The last question, however, that requires to be addressed, is that clause 3.3.l of the proposed scheme provides that the unsecured creditors have agreed that the consideration referred to in para 3.3.2 shall be in full and final settlement of dues and liabilities of PPIL of the guarantors for the liabilities of PPIL

towards the unsecured creditors. Ordinarily, there can be no difficulty in acceding to this proposal of absolving the guarantors of their liabilities to the extent of reduced claim which has been accepted as full and final settlement of dues and liabilities of the petitioner company under the proposed scheme by the respective described unsecured creditors. However, what is relevant to notice is that under section l28 of the Indian Contract Act,l872, it is provided that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Obviously, the tri-parte contract entered into with the guarantors in respect of the liabilities of the petitioner company with the concerned described unsecured creditors are not placed on record. Indeed, no contention has been raised on behalf of the objectors in this behalf. The question, however, is, if in the original contract, express provision has been made that irrespective of scaling down of claim between the described unsecured creditors and the petitioner company, the liability of the guarantors will continue to operate for the original amount, in that situation it will not be possible to approve the proposed scheme as it is to absolve the guarantors of their liabilities under the original agreement. The power of this court under section 39l is limited to

approve the compromise or arrangement between the company and its creditors. That power cannot be extended so as to undo or dilute in any manner the tri-parte contract between the guarantor who is a third party on the one hand and the petitioner company and the concerned unsecured creditors on the other. Viewed in this perspective, it is not possible for this court to approve the proposed scheme in relation to the described unsecured creditors as it is, but will have to be approved to the extent of full and final settlement of dues and liabilities of the petitioner company towards the concerned unsecured creditors on the terms referred to in the proposed scheme. In other words, the proposal of absolving the guarantors for the liabilities of the petitioner company towards unsecured creditors is not accepted, which aspect can be considered only after the relevant guarantees are placed before the court for scrutiny and after hearing the parties on this aspect.

46. Accordingly,both the petitions are disposed of on the following terms:

l) Company Petition No.469 of 2005 is made absolute in terms of prayer clauses (a) and (b);

2) Company Petition No. 470 of 2005 is made absolute in terms of prayer clauses (a) and (b) for the time being except the bracketed portion in clause 3.3.l i.e.not absolving the guarantors for the liabilities of the petitioner company towards the unsecured creditors.

3) The accompanying civil applications in the respective petitions are disposed of.

4) No order as to costs.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Company Petition No.469 of 2005
with
Company Petition No. 470 of 2005

Date of Judgment: l3th February 2006

For approval and signature of:

The Hon'ble Mr.A.M KHANWILKAR J.

1. Whether the Reporters of the local papers may be allowed to see the judgment/order?

2. Whether to be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad and Goa offices?